Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS, AFL-CIO,

Petitioner,

v.

COMPACT VIDEO SERVICES, INC.; COMPACT VIDEO GROUP, INC.; MERIDIAN STUDIOS; IMAGE TRANSFORM, INC.; AND JOHN DONLON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held that respondent Compact Video was not required to give notice under the Worker Adjustment and Retraining Notification Act ("WARN") of the impending sale of its videotape post-production business when all but five of Compact's employees immediately became employees of the buyer without the loss of a single day's employment and where the statutory language, the legislative history, Department of Labor regulations and an opinion of the Tenth Circuit Court of Appeals confirm that the sale of a business is not an "employment loss" requiring WARN notice.

2. Whether the Ninth Circuit correctly held that Petitioner was not entitled to additional discovery under Federal Rule of Civil Procedure 56(f) to determine whether a sale occurred.

3. Whether this Court should review the Department of Labor's regulations interpreting the WARN sale exemption to determine whether the regulations are consistent with the statute.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Compact Video Services, Inc., Compact Video Group, Inc., Meridian Studios, Image Transform, Inc. and John Donlon (hereinafter "Compact")[1] respectfully submit that the Petition for Writ of Certiorari (hereinafter the "Petition") should be denied for the reasons stated below. Respondents adopt the Petitioner's statement regarding Grounds for Jurisdiction and the Petitioner's Statement Re Statutes and Regulations. Respondents' deadline for filing this brief in opposition was extended to October 27, 1995 by the Clerk's letter dated September 12, 1995.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Respondents adopt the Statement of Facts (headed "Background") set forth in the Ninth Circuit's opinion in *International Alliance of Theatrical and Stage Employees v. Compact Video Services, Inc.* ("*Compact Video*"), 50 F.3d 1464 (9th Cir. 1995).

---

[1] Respondents Compact Video Services, Inc., Image Transform, Inc. and Meridian Studios are subsidiaries of respondent Compact Video Group, Inc. Compact Video Group, Inc. has no other subsidiaries and none of the other respondents has any subsidiaries.

B. PROCEEDINGS BELOW AND SUMMARY OF LOWER COURT OPINIONS

On August 11, 1993, the Union filed this action against Compact, seeking damages under the Worker Adjustment and Retraining Notification Act ("WARN" or "the Act") because Compact did not give its employees sixty days' advance notice of the sale of its video post-production business to ATS Acquisition Corp. ("ATS").[2] During discovery, the Union demanded discovery of the Compact-ATS sale agreement.

On September 13, 1993, Compact moved for summary judgment on the ground that the sale of Compact's business to ATS did not give rise to an "employment loss" requiring WARN notice because ATS' immediate rehire of almost all the Compact employees precluded a finding that fifty employees – the minimum necessary to trigger WARN's notice requirement – had suffered an employment loss as a result of the sale. The Union opposed summary judgment on two grounds: that WARN does not exempt sales transactions from its notice requirement and that, in any event, Compact had not adequately shown that a sale had taken place. The Union moved for a continuance under Federal Rule of Civil Procedure 56(f), seeking leave to discover the Compact-ATS sales agreement.

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[2] In September 1993, the Union filed a second action against Compact and ATS, alleging violations of federal labor law and collective bargaining agreements. The Union has also filed unfair labor practice charges before the National Labor Relations Board based on facts related to the sale.

The District Court granted Compact's summary judgment motion because the immediate transfer of Compact's employees to ATS' payroll precluded a finding that they had suffered a compensable "employment loss" under WARN. Thus, WARN notice was not required as a matter of law. The District Court also denied the Union's Rule 56(f) application because the Union had failed to show how the sales agreement would preclude summary judgment, *i.e.*, how it would alter the court's determination that less than fifty employees had suffered an employment loss. (App. 4, 6-7.)

The Ninth Circuit affirmed the District Court's grant of summary judgment, explaining that WARN, its legislative history and the DOL regulations promulgated under the Act all establish that employees who move from the payroll of the seller of a business to that of the buyer have not suffered an "employment loss" which triggers WARN's notice requirement. *Compact Video*, 50 F.3d at 1469. As additional authority, the Ninth Circuit cited an opinion of the Tenth Circuit Court of Appeals that had held only months earlier that "no sale shall implicate the Act." *Headrick v. Rockwell International Corp.*, 24 F.3d 1272, 1281 (10th Cir. 1994). The Ninth Circuit also affirmed the District Court's finding that discovery of the sales documents was unnecessary because nothing the documents might contain could defeat summary judgment. *Compact Video*, 50 F.3d at 1468.

C. SUMMARY OF ARGUMENT

Congress did not intend WARN to provide a remedy for the wrongs alleged by Petitioner. The Union asserts that the Compact employees were entitled to WARN notice because the sale "terminated" their employment with Compact, even though only five employees – far fewer than the requisite fifty – became unemployed as a result of the sale. Alternatively, the Union asserts that Compact was required to give its employees WARN notice because, as employees of ATS after the sale, they were no longer covered by a union contract and suffered reductions in their wages and benefits. In a holding that squares with an opinion of the Tenth Circuit Court of Appeals and which *is not in conflict with any decision of any other circuit court*, the Ninth Circuit correctly held that WARN does not offer a remedy for employees who are simply transferred from the payroll of a selling employer to the payroll of a buying employer without losing a day's work. WARN's statutory language, its legislative history and the DOL regulations which interpret it all establish that WARN was intended to provide a buffer for employees who are about to become actually unemployed, not to give employees who are simply transferred from one payroll to another "freedom of choice" to accept or reject the working conditions offered by the buyer. Permitting the Compact employees to maintain a WARN action would obviate WARN's sales exclusion and distort the purpose of the Act.

The second and third questions presented by the Petition are too insignificant to be addressed by this Court. The District Court's denial of the Union's Rule 56(f) application, by which the Union sought to discover

the sale agreement between Compact and ATS, is reviewable under the abuse of discretion s andard. As the Ninth Circuit correctly held, there can be no abuse of discretion where, as here, the Union failed to demonstrate how the sales documents would preclude summary judgment. If, as the Union maintains, the transaction was not *bona fide*, there is even less reason for WARN notice.

This Court should not review the DOL's WARN regulations and interpretive rulings concerning the sale exclusion because they are consistent with the language of WARN and its legislative history and because no circuit court of appeal has disagreed with the Ninth Circuit's interpretation of them.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT COURT OF APPEALS' DECISION CONCERNING THE APPLICABILITY OF WARN TO THE SALE OF A BUSINESS IS IN ACCORD WITH THE TENTH CIRCUIT'S RULING ON THE SAME ISSUE AND IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS.

This Court should deny the Petition for Writ of Certiorari, which fails to identify any conflict among the Circuits on the key issue of the existence of a sale exclusion in WARN and fails to present any other issue of general or continued importance that should be resolved by this Court.

Only one other circuit court of appeals has considered the pivotal question presented by the Petition:

whether the sale of a business triggers WARN's notice requirement. In that case, the Tenth Circuit Court of Appeals held that it does not:

> "Congress explicitly stated that employees who find themselves transferred from one company to another because of a sale simply are not to be held by any court to have suffered a remediable 'employment loss' ".

Headrick v. Rockwell International Corp., 24 F.3d 1272, 1280 (10th Cir. 1994). Like the Ninth Circuit, the *Headrick* court based its holding on the Act itself and its legislative history: "Congress added clear marching orders . . . directing firmly that no sale shall implicate the Act." *Id.* at 1281.

In its opinion below, the Ninth Circuit stated its agreement with *Headrick* that "[a] sale of a business is not a WARN event." *Compact Video*, 50 F.3d at 1469. Because the Ninth Circuit's opinion squares with *Headrick* and no other court of appeals has disagreed, the issue does not warrant review by this Court.

The unanimity of the Ninth and Tenth Circuit decisions also belies the Union's claim that the issue is "likely to recur." (Pet. 7.) The Union does not cite a single pending case that depends on the resolution of this issue and any cases that may be percolating through the lower courts are likely to follow the lead of the Ninth and Tenth Circuits. Thus, this case presents none of the considerations enumerated in Rule 10 of this Court as reasons for the granting of certiorari and the Petition should be denied.

II.

THE COURTS BELOW CORRECTLY HELD THAT THE UNION FAILED TO ESTABLISH AN ESSENTIAL ELEMENT OF A WARN ACTION – AN "EMPLOYMENT LOSS."

A. The Sale of a Business Is Not a WARN Event.

WARN's notice requirement is only triggered when 50 or more employees suffer an "employment loss." 29 U.S.C § 2104(a). WARN defines an "employment loss" as follows:

> "(A) *an employment termination,* other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding six months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period."

29 U.S.C. § 2101(a)(6) (emphasis added). The Union maintains that Compact was required to give its employees WARN notice of the sale because they were "terminated" by Compact – a fact the Union asserts the Ninth Circuit failed to "grasp." (Pet. 8.)

The Ninth Circuit ruled correctly. Recognizing that the Compact employees had been terminated in the sense that their employment by Compact ceased on the date of sale, the court nevertheless held that the employees did not suffer a covered employment loss because the statute expressly excludes from the definition of "employment loss" terminations that result from the sale of a business. The language of the statute itself, WARN's legislative history, the DOL's regulations and interpretive rulings and the *Headrick* opinion all compel this conclusion.

1. Statutory Language.

Section 2101(b) of WARN provides:

> **"(b) Exclusions from definition of employment loss.**
>
> "(1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with Section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale."

The Ninth Circuit properly held, as did the *Headrick* court, that the quoted "exclusion" means that a sale is not a WARN event:

> " 'the obligation to warn employees in the event of a closure or mass layoff skips from seller to buyer, *never triggered by the sale*. Any argument to the contrary is simply foreclosed by the statute itself.' "

Compact Video, 50 F.3d at 1467 (quoting *Headrick*, 24 F.3d at 1280 (emphasis added)).

The Union attempts to distinguish *Headrick* on its facts, suggesting that the seller in *Headrick* only escaped liability for WARN notice because, unlike Compact, the buyer had agreed to accept the seller's employees in advance and because there was no change in the employees' working conditions after the sale. (Pet. 12 n.2.)[3] This argument is meritless for two reasons. First, nothing in the sales exclusion requires a seller to insist upon a contract term guaranteeing its employees continued employment with the buyer. On the contrary, the DOL has stated that "such an allocation of responsibility is precisely contrary to the statutory language and intent." DOL Interpretive Ruling, 54 Fed. Reg. at 16052. Under the "absolute division of responsibility" dictated by Section 2101(b), had ATS simply decided not to hire any of Compact's employees, the Union would only have a claim against ATS, not Compact. In any event, the Tenth Circuit's holding in *Headrick* is not premised on the facts of a particular sale. On the contrary, the *Headrick* court avoided discussion of the facts, emphasizing instead the "firm" Congressional directive that "*no sale* shall implicate the Act." *Headrick*, 24 F.3d at 1281 (emphasis added). The parallels between the instant case and *Headrick* are thus inescapable.

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[3] The Union's position on *Headrick* clashes, of course, with its insistence that WARN does not contain a sales exclusion at all. (Pet. 14.)

2. Legislative History.

WARN's legislative history leaves no doubt that Congress intended the sale of a business to be exempt from WARN's notice requirement. Senator Metzenbaum, the principal author of WARN, stated:

> "When an employee is offered continued employment by the buyer of a facility, or a transfer to another facility within a reasonable commuting distance, that employee has not suffered an 'employment loss' that would help trigger the advance notice requirement." 134 Cong. Reg. S8374-01 (June 22, 1988) (statement of Senator Metzenbaum).

Senator Metzenbaum also made it clear that only plant closings or mass layoffs *resulting from* a sale of a business – not the sale itself – would trigger WARN's notice requirement, explaining that Section 2101(b)(1):

> "clarifies our intent that employees receive notice if there is a plant closing or mass layoff *incident to* the sale of part or all of a business. . . . Employers and affected employees will always know clearly which employer must give notice if a plant closing or mass layoff is ordered." 134 Cong. Rec. S8680 (June 28, 1988) (statement of Senator Metzenbaum).

Indeed, the sale exclusion was added to the statute precisely to forestall the kind of claim the Union makes here.[4] Senator Hatch, who authored the sale exclusion, argued the need for it as follows:

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[4] The *Headrick* court explained that the sale exclusion was added to the Act after some Members of Congress expressed concern that, without it, "adventuresome plaintiffs, perhaps not

> "There is no question that under **[the WARN bill prior to addition of the sales exclusion]**, when a business is sold to another company and the employees go off the old company's payroll and on the new one, a plant closing for purposes of this act has taken place.
>
> "It would seem fairly obvious that if the business continues on as before with no significant changes of any kind, that there would be no need to go through the formal notification process. But that is not how the bill works.
>
> ". . . .
>
> "Under this clause, we will now have a new way of doing business in this country. Namely, no business will be bought or sold in the United States without there being a public announcement of the sale 60 days ahead of time. . . .
>
> ". . . .
>
> "Whether or not the sponsors intend it, this requirement obviously will have a chilling effect on the transfer of business operations in the United States, and thus will lead to a lot of dislocations for businesses and a lot more failing businesses that could have been saved had there been the flexibility that this bill does not provide. . . . " 134 Cong. Rec. 16026-27 (1988) (statement of Senator Hatch).

It was precisely to cure this flaw in the draft bill that Senator Hatch proposed the sale exclusion as an amendment:

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unlike appellants here, might well urge a court to hold 'employment loss' to cover workers shifted from one employer to another as the result of a sale." *Headrick*, 24 F.3d at 1280.

> "My amendment clarifies these points, I think. [I]t clearly states that only a plant closing or a mass layoff as defined by this act, after the effective date of sale, would trigger the notice requirements. So it makes that clear. That is what I think the authors of the bill wanted to do to begin with, but they have not done so."

134 Cong. Rec. 16104-05 (1988) (statement of Senator Hatch).

Thus, even if the sale exclusion itself left room for the Union's interpretation, WARN's legislative history erases any doubt about Congress' intent: the sale of a business is not itself a WARN event.[5]

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[5] In his dissent to the Ninth Circuit opinion below, Justice Ferguson argued that the Compact sale does not qualify for the sale exclusion because it was a sale of assets, not the sale of a business. The distinction he attempts to draw is illusory. There is no suggestion, either in the statutory language, the legislative history or the regulations that Congress intended to make application of the sale exclusion turn on such a technicality. Moreover, Justice Ferguson's narrow reading of the sale exclusion would greatly reduce its efficacy. As explained in the text, the sale exclusion was added to the bill to minimize "the chilling effect on the transfer of business operations" that would result if WARN notice could be triggered by the sale of a business. 134 Cong. Rec. 16027 (1988) (Statement of Senator Hatch). Justice Ferguson correctly observed that the sale exclusion will exempt a great many technical terminations from the sweep of WARN's notice requirement. 50 F.3d at 1471. *That was manifestly Congress' intent.* Justice Ferguson's interpretation of the sale exclusion would severely curtail its application and thwart Congress' purpose.

3. DOL Regulations.

Finally, the regulations and interpretive comments promulgated by the DOL, the agency charged with administering WARN, echo the foregoing reasoning and dispose of the Union's claim that any termination, even one caused by the sale of a business, automatically triggers WARN's notice requirement:

> "Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, *WARN notice is only required where the employees, in fact, experience a covered employment loss.*"

20 C.F.R. § 639.6 (emphasis added). In its Final Interpretive Rule, the DOL reemphasized that a sale itself does not constitute a "covered employment loss":

> "[Section 639.6] has been revised to make it clear that . . . the technical termination that may be deemed to occur upon the consummation of the sale does not, in itself, create notice rights."

Final Interpretive Rule and Supplementary Information, § 639.6, 54 Fed. Reg. 16042.

Elsewhere in the Final Interpretive Rule, the DOL agrees with commentators who suggested that, "although a technical termination (*i.e.*, the termination of employment with the seller) may be deemed to have occurred in a sale, that termination, by itself, is not a basis for WARN notice." Final Interpretive Rule § 639.4(c), 54 Fed. Reg. 16042, 16052.

"Courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent." *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J. concurring) (citation omitted). In this instance, both the substantive regulation and the interpretive rule track the language of WARN and are consistent with its legislative history. Thus, there is no basis for rejecting the DOL's interpretation.[6]

B. A WARN Action in this Context Would Be Inconsistent with the Purpose of the Act.

Although the Union asserts that "the fundamental purposes of WARN are effectuated by this suit" (Pet. 13), exactly the opposite is true: The Union's insistence that a termination, however technical it might have been, nonetheless amounts to an "employment loss" under the Act is *inconsistent* with the underlying purpose of WARN. The Department of Labor has articulated that purpose as follows:

> "[WARN] provides protection to workers, their families and communities by requiring

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[6] In the Union's third question presented, it asks this Court to review DOL regulation 639.6 to determine its consistency with WARN. This is not a significant question requiring review by this Court. There is no conflict among the circuits: The Ninth Circuit, which commented favorably on the regulation in its opinion below, is the only circuit court that has passed on the regulation. Moreover, as explained above, the regulation is entirely consistent with the text of WARN and its legislative history. Accordingly, this Court should not grant review of the Union's third question presented.

> employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided."

20 C.F.R. 639.1(a). *See also* 134 Cong. Rec. S8374 (June 22, 1988) (statement of Senator Byrd) (purpose is to enable workers to "save some money for the lean days ahead . . . [and to] give [ ] local government time to prepare for new burdens on its retraining and education programs"); 134 Cong. Rec. S7672 (June 13, 1988) (statement of Senator Roth) (purpose is to "cushion the financial and psychological blow of job loss . . . [and to] help . . . individuals to make the transition to another form of productive, rewarding employment.").

The district court in *Headrick* rejected the very "technical termination" argument the Union raises here, holding that the Rockwell employees' termination was "too insubstantial to merit the Act's protection" because the employees were immediately rehired by the successor employer and never faced the need to readjust to unemployment, retrain, find new work or seek unemployment compensation. *Headrick*, 24 F.3d at 1280 (citing district court opinion).[7] The court explained that "Congress

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[7] The lower courts have consistently rejected the "technical termination" definition of "employment loss" in favor of a

meant 'employment loss' to cover only employees truly idled or deprived of income." *Id.*

The district court's decision in *Headrick* is consistent with the purposes of the Act, its legislative history and the DOL regulations cited above.[8] In the instant case, only five employees were "truly idled or deprived of income" as a result of the sale of Compact's business – far short of the fifty required to trigger WARN notice. Because the Compact employees never became unemployed, permitting them to pursue a WARN Act claim under these circumstances would not advance any of the Act's underlying purposes. On the contrary, the Union's

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"practical, effects-driven analysis of whether a break in employment actually occurred." *See Moore v. Warehouse Club, Inc.*, 992 F.2d 27 (3rd Cir. 1993) (no WARN notice necessary where transfer offers were extended on the date of closing rather than prior to it because employees never became unemployed and there was thus no need to ensure opportunities for retraining and reemployment); *Martin v. AMR Services Corp.*, 877 F. Supp. 108 (E.D.N.Y. 1995) ("[w]here employees are transferred almost instantly to other positions, the need to ensure adequate time for retraining or reemployment does not exist.").

International Paperworkers v. Specialty Paperboard, Inc., 999 F.2d 51 (2d Cir. 1993) and other cases cited by the Union (Pet. 11-12) do not alter this conclusion. In those cases, the courts' analysis was directed toward identifying the appropriate date on which to commence the running of the statute of limitations on a WARN action. Such a narrowly focused approach is not useful where the court must decide the more complex issue whether an "employment loss" occurred. *Martin*, 877 F. Supp. at 114.

[8] The Tenth Circuit declined to decide the "technical termination" issue, basing its decision, instead, on the sale exclusion.

narrow definition of "employment loss," if adopted, would nullify much of WARN's stated purpose.

C. WARN Does Not Require Notice For Changes In Terms and Conditions Of Employment.

Included within the Union's first question presented is its claim that WARN notice is required whenever an employer modifies the terms and conditions of employment in a way that is unfavorable to its employees; the Union asserts that such changes constitute "employment loss" within the meaning of WARN. As explained above, WARN was intended to provide a buffer for employees who are about to become unemployed. A finding that WARN was intended to remedy every unwelcome change in working conditions would fly in the face of the statute, its legislative history and the DOL regulations.[9]

As the Ninth Circuit observed, such a sweeping reading of WARN would produce absurd results uncontemplated by Congress. Employers would be required "to give

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[9] The Union's suggestion that ATS' impairment of the Compact employees' working conditions should be seen as a constructive discharge (Pet. 14 n.3) is meritless because there can be no constructive discharge when the employees do not quit. The N.L.R.B. decision on which the Union relies, *Canteen Company*, 317 N.L.R.B. No. 135, states a standard formulation of the constructive discharge doctrine: "employees who *quit* rather than work under conditions established in derogation of the statutory right to bargain . . . [are] . . . constructively discharged. . . ." *Canteen Company*, 317 N.L.R.B. No. 135, p. E-17 (ALJ opinion) (emphasis added). In this case, the Compact employees did not quit, but accepted ATS' working conditions. Therefore, they cannot be said to have been constructively discharged.

60 days' notice for every wage adjustment and modification of employee handbooks." *Compact Video*, 50 F.3d at 1468-69. WARN contains no hint that Congress intended the statute to intrude so sharply into employer business decisions. "Employees must look to other sources of law, for example federal labor laws, ERISA, or common law contract principles," to remedy changes in working conditions perceived by the employee to be unjust. *Id.* at 1469.[10]

Even if a change in working conditions were an "employment loss" that triggered WARN, the Union has brought this action against the wrong party. The sale exclusion creates an "absolute division of responsibility" as between the buyer and seller of a business for giving WARN notice if it is required: The seller is responsible for giving notice of covered actions (plant closings or mass layoffs) that occur up to and including the date of sale and the buyer is responsible thereafter. 29 U.S.C. § 2101(b)(1); DOL Final Interpretive Rule § 639.4(c), 54 Fed. Reg. 16042, 16052. It is undisputed that the employment terms to which the Union objects went into effect after the date of the sale. Accordingly, even if a change in working conditions triggered WARN, the Union's only recourse would be against the buyer, ATS.

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[10] Indeed, the Union is pursuing such alternative remedies. In a case filed with the NLRB and in another district court action, the Union is claiming that Compact sought to avoid its legal obligations to the Union and engaged in unfair labor practices.

III.

THE UNION'S SECOND QUESTION PRESENTED DOES NOT PRESENT A SIGNIFICANT QUESTION AND WAS CORRECTLY DECIDED BELOW.

The Union opposed Compact's summary judgment motion by asserting that additional discovery – examination of the sales documents – was necessary to establish whether Compact had actually sold its video post-production business to ATS or whether the transaction was a sham. On its face, this is not a significant question that requires review by this Court.

The district court's denial of the Union's discovery motion is reviewed for abuse of discretion. *Qualls v. Blue Cross of California*, 22 F.3d 839, 844 (9th Cir. 1994). There can be no abuse of discretion where the moving party fails to show how permitting additional discovery would preclude summary judgment. *Id.*

The Union failed to prove to the district court's satisfaction that discovery of sales documents would preclude summary judgment. If the documents showed that the transaction was truly a sale, it would be subject to the sales exclusion. If the documents demonstrated that the sale was a sham, Compact would still own the business it claims it sold and the complaining employees would still be employees of Compact. In either event, the Union would still be unable to establish that fifty or more Compact employees had suffered an "employment loss." Accordingly, the Ninth Circuit correctly held that the District Court did not abuse its discretion by denying the Union's Rule 56(f) application.

CONCLUSION

Because the Petition presents no issue appropriate for this Court's review and because the lower courts' holdings were not in error, respondents pray that the Petition be denied.

October 26, 1995.

Respectfully submitted,

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ADDENDUM

APPENDIX

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE EDWARD RAFEEDIE, JUDGE PRESIDING

INTERNATIONAL ALLIANCE, ET AL.,	)	
PLAINTIFFS,	)	
VS.	)	CASE NO. CV-93-4737-ER
COMPACT VIDEO SERVICES, INC., ET AL.,	)	
DEFENDANTS.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, OCTOBER 18, 1993

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LOS ANGELES, CALIFORNIA; MONDAY, OCTOBER 18, 1993; 10:00 AM

THE COURT: INTERNATIONAL ALLIANCE V. COMPACT VIDEO.

MR. KOPENHEFFER: RICHARD W. KOPENHEFFER FOR COMPACT VIDEO.

MR. GOTTLIEB: IRA L. GOTTLIEB FOR PLAINTIFF INTERNATIONAL ALLIANCE.

THE COURT: THIS IS A MOTION FOR SUMMARY JUDGMENT BROUGHT BY ALL DEFENDANTS IN THE CASE. THE COURT HAS READ AND CONSIDERED ALL OF THE PAPERS THAT HAVE BEEN FILED. SUBMITTED BY THE PARTIES, AND TENTATIVELY CONCLUDES AS FOLLOWS: THE SUMMARY JUDGMENT SHOULD BE GRANTED FOR ALL DEFENDANTS IN THIS CASE.

THE STANDARD IS WELL-KNOWN, A MOTION FOR SUMMARY JUDGMENT. I DON'T NEED TO REPEAT IT HERE.

BUT IN WEIGHING THE EVIDENCE PRESENTED IN A SUMMARY JUDGMENT MOTION, THE EVIDENCE OF THE NON-MOVING PARTY IS TO BE BELIEVED AND ALL JUSTIFIABLE INFERENCES ARE

TO BE DRAWN IN HIS FAVOR. AND THAT IS THE WAY I HAVE ANALYZED THIS.

THE WORKER'S ADJUSTMENT AND RETAINING NOTIFICATION ACT, 29 USC, SECTION 2101, PROVIDES PROTECTION TO WORKERS BY REQUIRING EMPLOYERS TO GIVE NOTICE 60 CALENDAR DAYS IN ADVANCE OF PLANT CLOSING AND MASS LAYOFFS.

THIS GIVES WORKERS SOME TRANSITITION TIME TO ADJUST TO THE PROSPECT OF LOSING EMPLOYMENT. BUT THIS STATUTE APPLIES ONLY TO PLANT CLOSINGS AND MASS LAYOFFS, NEITHER OF WHICH OCCURRED HERE.

29 USC, 2101(A)2 DEFINES PLANT CLOSING AS THE PERMANENT OR TEMPORARY SHUT DOWN OF A SINGLE SITE OF EMPLOYMENT. IF THE SHUT DOWN RESULTS IN AN EMPLOYMENT LOSS AT THE SINGLE SITE OF EMPLOYMENT DURING ANY THIRTY-DAY PERIOD FOR 50 OR MORE EMPLOYEES.

AND MASS LAYOFF IS DEFINED AS A REDUCTION IN FORCE WHICH IS NOT THE RESULT OF PLANT CLOSING, AND RESULTS IN AN EMPLOYMENT LOSS AT THE SINGLE SITE OF EMPLOYMENT DURING ANY 30-DAY PERIOD FOR AT LEAST 50 EMPLOYEES.

DEFENDANTS HAVE PRESENTED EVIDENCE, WHICH IS UNCONVERTED BY THE PLAINTIFF, THAT OF THE 314 WORKERS EMPLOYED BY THE DEFENDANT PRIOR TO THE SALE TO A.T.S., 306 WERE REHIRED BY A.T.S. AFTER THE SALE. THUS, THERE

WERE FEWER THAN 50 EMPLOYEES WHO CONCEIVABLY COULD HAVE LOST THEIR JOBS AS A RESULT OF THE SALE.

WITHOUT SATISFACTION OF THIS STATUTORY THRESHOLD, THERE IS NO EVIDENCE THAT THE STATUTE APPLIES TO THESE FACTS. THERE IS NO GENUINE ISSUE OF MATERIAL ACT [sic] TO BE DECIDED.

THE PLAINTIFFS HAVE REQUESTED THE COURT TO REFUSE OR CONTINUE THIS MOTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 56(F), WHICH ALLOWS THE COURT TO DENY A MOTION FOR SUMMARY JUDGMENT OR ORDER A CONTINUANCE TO ALLOW THE NON-MOVING PARTY TIME FOR ADDITIONAL DISCOVERY OF FACTS ESSENTIAL TO JUSTIFY THE PARTY'S POSITION.

THOUGH THE PLAINTIFF HAS RAISED SEVERAL AREAS OF DISCOVERY WHICH IT WOULD LIKE TO PURSUE, NONE DEAL WITH THE THRESHOLD QUESTION OF THE NUMBER OF EMPLOYEES TERMINATED BY THE DEFENDANT.

BECAUSE THE PLAINTIFF HAS MADE NO SHOWING THAT FURTHER DISCOVERY WOULD ALTER ITS JUDGMENT IN THIS MATTER, THAT IS, IT WOULD ALTER THE COURT'S JUDGMENT, THE COURT DECLINES TO GRANT A 56(F) CONTINUANCE.

THE PLAINTIFFS HAVE PRESENTED EVIDENCE WHICH RAISES QUESTIONS ABOUT THE LEGITIMACY OF THE SALE OF THE COMPACT ENTITIES TO A.T.S. HOWEVER, THE PLAINTIFF CANNOT FIND RELIEF FOR THESE PROBLEMS IN THE TERMS OF THE

STATUTE. THE STATUTE WAS SIMPLY NOT MEANT TO CARRY THIS LOAD.

THEREFORE, SUMMARY JUDGMENT APPEARS TO BE APPROPRIATE HERE FOR ALL DEFENDANTS.

DOES THE PLAINTIFF WISH TO BE HEARD?

MR. GOTTLIEB: YES, YOUR HONOR, WE DO, I DO.

YOUR HONOR, I THINK THE LITERAL TERMS OF THE STATUTE, 2101(A)6, THERE ARE THREE DIFFERENT WAYS AN EMPLOYMENT LOSS IS DEFINED IN THAT SUBSECTION OF THE WARREN [sic] ACT.

FIRST IS AN EMPLOYMENT TERMINATION OTHER THAN A DISCHARGE FOR CAUSE, VOLUNTARY DEPARTURE, RETIREMENT; THAT'S THE FIRST ONE.

SECOND ONE IS A LAYOFF EXCEEDING SIX MONTHS. AND THE THIRD IS A REDUCTION IN HOURS OF WORK OF MORE THAN 50 PERCENT DURING EACH MONTH OF ANY SIX-MONTH PERIOD.

SO AN EMPLOYMENT LOSS DOES NOT NECESSARILY REQUIRE ANY TIME, ANY SET NUMBER OF HOURS OR DAYS OFF THE JOB.

IN THIS CASE, COMPACT VIDEO TOLD MOST ALL OF ITS EMPLOYEES, "YOU ARE NO LONGER GOING TO BE EMPLOYED BY THE COMPACT ENTITIES." ONCE THAT HAPPENED, THOSE COMPACT EMPLOYEES HAD SUFFERED AN EMPLOYMENT LOSS.

IF OTHER EMPLOYERS OTHER THAN A.T.S. HAD REHIRED THOSE PEOPLE, THAT WOULDN'T STOP COMPACT FROM HAVING A WARREN [sic] OBLIGATION.

THE COURT HASN'T ADDRESSED WHETHER THE SALE AND THE REHIRE BY THE PURCHASER MIGHT BE AN EXEMPTION TO THE WARREN [sic] ACT.

WE QUESTION WHETHER THERE WAS A SALE –

THE COURT: WELL, BUT THE STATUTE, IF NOT EXPRESSLY, BY IMPLICATION, IT STATES WHEN THERE IS A SALE OF A BUSINESS, THAT BEFORE THE SALE THE OBLIGATIONS OF THE STATUTE ARE ON THE SELLER, AND AFTER THE SALE ARE ON THE BUYER.

BY IMPLICATION, IT SEEMS TO ME, THAT THE SALE IS NOT CONSIDERED A REPORTABLE TRANSACTION. IS NOT CONSIDERED EITHER A SHUT DOWN OF THE PLANT OR A MASS LAYOFF.

MR. GOTTLIEB: WELL, AT THE VERY MINIMUM, YOUR HONOR, I THINK WE NEED TO LOOK INTO WHETHER THERE WAS A LEGITIMATE SALE HERE. WHAT WE HAVE IS A DECLARATION FROM THE CHIEF FINANCIAL OFFICER –

THE COURT: WHY DO YOU THINK IT WASN'T A LEGITIMATE SALE?

MR. GOTTLIEB: BECAUSE, IN PART, BECAUSE THE COMPANY HAS FAILED TO PROVIDE US, DESPITE REPEATED REQUESTS, WITH ANY COMPETENT INFORMATION ABOUT THE LEGITIMACY OF THE – ABOUT THE EXISTENCE OF THE SALE.

THE COURT: WHAT DIFFERENCE WOULD IT MAKE? WHEN YOU SAY IT'S NOT LEGITIMATE, WHAT DOES THAT MEAN?

MR. GOTTLIEB: WE DON'T KNOW WHETHER A.T.S., THE NEW ENTITY THAT IS ACTING AS THE PURCHASER, IS, IN FACT, A DIFFERENT COMPANY. WE DON'T KNOW –

THE COURT: YOU MEAN YOU THINK THAT THE SALE MIGHT HAVE BEEN A FRAUDULENT SALE SIMPLY FOR THE PURPOSE OF GETTING BETTER TERMS FROM THE EMPLOYEE?

MR. GOTTLIEB: THAT'S, IN FACT, EXACTLY WHAT THE I.A.T. HAS ALLEGED IN A SEPARATE LAWSUIT.

THE COURT: YOUR REMEDY WOULD NOT LIE IN THIS STATUTE IF THAT WERE TRUE, WOULD IT? IT WOULD LIE IN SOME OTHER –

MR. GOTTLIEB: IF IN FACT –

THE COURT: – UNFAIR LABOR PRACTICE, OR WHATEVER, BUT –

MR. GOTTLIEB: WE ARE PURSUING OTHER REMEDIES. WE ARE TRYING TO FIND OUT, AND I THINK UNTIL WE KNOW THAT THERE IS A SALE, THE COURT SHOULD NOT RELY ON SOME SALE EXEMPTION THAT'S BEEN IMPLIED HERE AS A BASIS FOR SUMMARY JUDGMENT AT THIS EARLY STAGE IN THE LITIGATION.

THE COURT: ALL RIGHT.

THE MOTION FOR SUMMARY JUDGMENT IS GRANTED.

MR. KOPENHEFFER: THANK YOU, YOUR HONOR.

MR. GOTTLIEB: THANK YOU, YOUR HONOR.

(PROCEEDINGS ADJOURNED)

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I, MARY TUCKER, CSR, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT IS TRUE AND CORRECT.

/s/ Mary Tucker — 11/17/93
MARY TUCKER, CSR — DATE